

**KIRKLAND & ELLIS LLP**

AND AFFILIATED PARTNERSHIPS

Paul D. Clement  
To Call Writer Directly:  
(202) 879-5013  
paul.clement@kirkland.com

655 Fifteenth Street, NW  
Washington, DC 20005  
(202) 879-5000  
www.kirkland.com

Facsimile:  
(202) 879-5200

August 28, 2018

**By Electronic Case Filing**

Molly Dwyer  
Clerk of the Court  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

**Re: *Dent v. National Football League*, No. 15-15143**  
Fed. R. App. P. 28(j) Letter Regarding *Alaska Airlines Inc. v. Schurke*, No. 13-35574, 2018 WL 3636431 (9th Cir. Aug. 1, 2018) (en banc)

Dear Ms. Dwyer:

Appellee submits this response to appellants' August 16, 2018 letter regarding *Alaska Airlines*. That decision confirms that §301 of the Labor Management Relations Act (LMRA) preempts appellants' claims.

*Alaska Airlines* considered whether the Railway Labor Act (RLA) preempts a worker's claim premised on an "independent state law right" under the Washington Family Care Act "to use ... accrued [vacation] time" for family medical reasons. 2018 WL 3636431, at \*1. The court noted that LMRA and RLA preemption cases generally implicate the same "body of case law," which provides that "an application of state law is pre-empted" if it "requires the interpretation" of a collective-bargaining agreement (CBA). *Id.* at \*1 n.1, \*7. The court further observed that "[i]nterpretation" entails more than "refer[ring]" to "undisputed" CBA terms, and that neither the RLA nor the LMRA "preempt[s] state rules that establish rights ... independent of a labor contract." *Id.* at \*7-\*8. Against those principles, the court found no preemption: The parties "agree[d]" that, under the CBA, the worker had "seven days of banked vacation," and "consult[ing]" a CBA "to confirm the existence of accrued vacation days" does not "extinguish an independent state law right to use the accrued time" for family medical reasons. *Id.* at \*1, \*12.

Unlike in *Alaska Airlines*, appellants' claims are not grounded in non-negotiable statutory rights. Appellee Br.3. Instead, appellants alleged negligence and fraud claims that, as Judge Alsup found, require a court to "interpret" and "construe" CBA provisions, ER13, that are hardly "undisputed." Indeed, there is sharp disagreement over whether the NFL assumed a duty in the CBAs regarding player medical treatment and, if so, whether it acted reasonably or negligently, and whether appellees justifiably relied on the NFL's statements or omissions when the CBAs assigned medical responsibilities to other parties. The "appropriate forum" for resolving these CBA disputes is grievance and arbitration, as the NFL Players Association recognized last year

when it filed a grievance largely duplicating appellants' claims here. *Alaska Airlines*, 2018 WL 3636431, at \*9; Dkt.47. That grievance also confirms that appellants' failure to exhaust mandatory dispute-resolution procedures independently requires affirmance. Appellee Br.49-53.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. D. Clement', with a stylized flourish at the end.

Paul D. Clement  
*Counsel for Appellee*  
*National Football League*

cc: All Counsel of Record (via CM-ECF)

**CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement  
Paul D. Clement